EXHIBIT H

Freedom of Information Act Guide, May 2004

Exemption 7(C)

Exemption 7(C) provides protection for personal information in law enforcement records. This exemption is the law enforcement counterpart to Exemption 6, which is the FOIA's fundamental privacy exemption. (See the discussions of the primary privacy-protection principles that apply to both exemptions under Exemption 6, above.) Exemption 7(C) provides protection for law enforcement information the disclosure of which "could reasonably be expected to constitute an unwarranted invasion of personal privacy."(1) Despite their similarities in language, though, the sweep of the two exemptions can be significantly different.

Whereas Exemption 6 routinely requires an identification and balancing of the relevant privacy and public interests, Exemption 7(C) can be even more "categorized" in its application. Indeed, the Court of Appeals for the District of Columbia Circuit held in SafeCard Services v. SEC(2) that based upon the traditional recognition of the strong privacy interests inherent in law enforcement records,(3) and the logical ramifications of United States Department of Justice v. Reporters Committee for Freedom of the Press,(4) the "categorical withholding" of information that identifies third parties in law enforcement records will ordinarily be appropriate under Exemption 7(C).(5) (See the discussion of the Supreme Court's Reporters Committee decision under Exemption 6, The Reporters Committee Decision, above.)

Certain other distinctions between Exemption 6 and Exemption 7(C) are apparent: in contrast with Exemption 6, Exemption 7(C)'s language establishes a lesser burden of proof to justify withholding in two distinct respects.(6) First, it is well established that the omission of the word "clearly" from the language of Exemption 7(C) eases the burden of the agency and stems from the recognition that law enforcement records are inherently more invasive of privacy than "personnel and medical files and similar files."(7) Indeed, the "'strong interest' of individuals, whether they be suspects, witnesses, or investigators, 'in not being associated unwarrantedly with alleged criminal activity'" has been repeatedly recognized.(8)

Second, the Freedom of Information Reform Act of 1986 further broadened the protection afforded by Exemption 7(C) by lowering the risk-of-harm standard from "would" to "could reasonably be expected to."(9) This amendment to the Act eased the standard for evaluating a threatened privacy invasion through disclosure of law enforcement records.(10) One court, in interpreting the amended language, pointedly observed that it affords the agency "greater latitude in protecting privacy interests" in the law enforcement context.(11) Such information "is now evaluated by the agency under a more elastic standard; exemption 7(C) is now more comprehensive."(12)

Under the balancing test that traditionally has been applied to both Exemption 6 and Exemption 7(C), the agency must first identify and evaluate the privacy interest(s), if any, implicated in the requested

and held the names to be properly protected.(28) Significantly, the court also recognized that "the only imaginable contribution that this information could make would be to enable the public to seek out individuals who had been tangentially involved in investigations and to question them for unauthorized access to information as to what the investigation entailed and what other FBI personnel were involved."(29) More recently, after undertaking a post-Reporters Committee analysis, the same district court strongly reaffirmed that identities of both FBI clerical personnel and low-level special agents are properly withheld as a routine matter under Exemption 7(C), even when they take part in a highly publicized investigation.(30)

On the other hand, the Court of Appeals for the Ninth Circuit has exhibited a persistent lack of obeisance to the Reporters Committee decision.(31) In two of its most recent decisions, Lissner v. United States Customs Service(32) and Favish v. Office of Independent Counsel,(33) the Ninth Circuit inexplicably ignored well-recognized privacy interests and refused to adhere to the narrow definition of public interest set forth in Reporters Committee.(34) In Lissner, the Ninth Circuit ordered disclosure of the "general physical description" of two state law enforcement officers who were involved in smuggling steroids.(35) In so doing, it neglected to consider the fact that the physical descriptions of these persons would shed no light on the activities of the United States Customs Service.(36)

Likewise, in Favish v. Office of Independent Counsel, in attempting to balance the interests involved in ten photographs of the scene of Deputy White House Counsel Vincent Foster's suicide, the Ninth Circuit sent the case to the district court for it to view the photographs in camera and inevitably order disclosure under highly flawed standards(37) -- doing so even though those very photographs had been held to be protected by Exemption 7(C) in a previous case.(38) Further, in analyzing the public interest in disclosure, the Ninth Circuit purported to follow Reporters Committee yet based its finding of public interest in disclosure of the photographs merely upon plaintiff's "doubts" regarding the adequacy of the government's investigation into the suicide(39) -- leading to an order from the district court to disclose five of the death-scene photographs.(40)

This past year the Supreme Court very soundly rejected the Ninth Circuit's crabbed views of privacy protection, and its acceptance of spurious public interest arguments, in NARA v. Favish.(41) It ruled that while the Ninth Circuit had recognized the family's privacy interest and the nature of the asserted public interest, it had utterly failed to properly balance the two when it required no credible evidence showing actual government wrongdoing.(42) Such a reading of the Reporters Committee public interest standard in this context, the Supreme Court said, "leaves Exemption 7(C) with little force or content."(43) So under the Supreme Court's ruling in Favish, and its decision to protect the photographs at issue, a FOIA requester's assertion of a public interest based on "government wrongdoing" now must meet a distinctly higher standard.(44) Indeed, the Supreme Court's repudiation of the Ninth Circuit's decision in Favish is sweeping enough to discredit (or effectively overrule) that circuit court's previous aberrational privacy jurisprudence.(45) (See also the further discussions of Favish's fundamental privacy-protection principles under Exemption 6, above.)

Furthermore, Favish now seriously calls into question the continued vitality of the Sixth Circuit's

singular view of an individual's privacy interest as enunciated by a divided panel in Detroit Free Press, Inc. v. Department of Justice, a case involving the disclosure of "mug shots."(46) The Supreme Court reiterated in Favish that privacy rights are not a "cramped notion"(47) and that Exemption 7(C)'s privacy protection must be construed broadly in light of its specific language and "comparative breadth" to the language of Exemption 6.(48) The fact that photographs taken of a private citizen in a public place become available to the public at large does not lessen the privacy interest in those photographs, contrary to the conclusion reached by the Sixth Circuit.(49) In fact, affirmatively making such photographs available to the public can go beyond merely violating privacy to inviting harassment, stigmatization, and overwhelming media scrutiny.(50) One court has logically distinguished "mug shots" from standard photographs, noting that a "mug shot" carries with it a unique "stigmatizing effect," even for a defendant who already has been convicted and sentenced.(51) Thus, in light of the Favish decision, atop the overwhelming weight of case law broadly interpreting Exemption 7(C)'s privacy protection, Detroit Free Press should no longer be regarded as authoritative even within the Sixth Circuit.

In Reporters Committee, the Supreme Court found that substantial privacy interests can exist in personal information such as is contained in "rap sheets," even though the information has been made available to the general public at some place and point in time. Applying a "practical obscurity" standard,(52) the Court observed that if such items of information actually "were 'freely available,' there would be no reason to invoke the FOIA to obtain access to [them]."(53) (See Exemption 7(D), below, for a discussion of the status of open-court testimony under that exemption.)

All but one court of appeals to have addressed the issue have found protectible privacy interests in conjunction with or in lieu of protection under Exemption 7(D) -- in the identities of individuals who provide information to law enforcement agencies.(54) Consequently, the names of witnesses and their home and business addresses have been held properly protectible under Exemption 7(C).(55) Additionally, Exemption 7(C) protection has been afforded to the identities of informants,(56) even when it was shown that "the information provided to law enforcement authorities was knowingly false."(57)

Although on occasion a pre-Reporters Committee decision found that an individual's testimony at trial precluded Exemption 7(C) protection,(58) under the Reporters Committee "practical obscurity" standard trial testimony should not diminish Exemption 7(C) protection.(59) Plainly, if a person who actually testifies retains a substantial privacy interest, the privacy of someone who is identified only as a potential witness likewise should be preserved.(60)

Moreover, courts have repeatedly recognized that the passage of time will not ordinarily diminish the applicability of Exemption 7(C).(61) This may be especially true in instances in which the information was obtained through questionable law enforcement investigations.(62) In fact, the "practical obscurity" concept expressly recognizes that the passage of time may actually increase the privacy interest at stake when disclosure would revive information that was once public knowledge but has long since faded from memory.(63)

curiam) (ruling that requester had "once again failed to demonstrate" that agency engaged in illegal activity, and finding that same privacy interest in nondisclosure of photograph of hand and description of body existed as in Accuracy in Media, 194 F.3d at 122).

39. 217 F.3d at 1174; see also id. at 1184 (Pregerson, J., dissenting) (observing that "Favish has made no showing that anyone connected with the OIC's investigations . . . engaged in wrongful conduct"; explaining that the requester bears the burden of advancing the public interest, and that this requester "has failed to do so").

40. Favish, 2001 WL 770410, at *1 (ordering five of ten photographs at issue released to plaintiff).

41. 124 S. Ct. 1570 (2004), reh'g denied, No. 02-409, 2004 WL 108633 (U.S. May 17, 2004).

42. Id. at 1581.

43. Id.

44. Id. at 1580-81; see also *FOIA Post*, "Supreme Court Rules for 'Survivor Privacy' in Favish" (posted 4/9/04) (discussing higher standard, as well as continued need for showing of Reporters Committee-type public interest even when requester successfully alleges government wrongdoing).

45. See, e.g., Lissner, 241 F.3d at 1224; Rosenfeld, 57 F.3d at 812; Dobronski v. FCC, 17 F.3d 275, 278 (9th Cir. 1994); Dow Jones Co., Inc. v. FERC, 219 F.R.D. 167, 175-76 (C.D. Cal. 2003) (ordering disclosure of names of individuals who cooperated with investigation, expressly based upon Ninth Circuit's now-repudiated Favish ruling, merely because they were not accused of criminal activity); see also *FOIA Post*, "Supreme Court Rules for 'Survivor Privacy' in Favish" (posted 4/9/04) (analyzing Favish decision's sweeping impact on Ninth Circuit case law).

46. 73 F.3d 93, 98 (6th Cir. 1996) (finding that disclosure of mug shots of indicted individuals who had already appeared in court and had their names divulged did not constitute unwarranted invasion of privacy).

47. See Reporters Committee, 489 U.S. at 763; see also *FOIA Post*, "Supreme Court Rules for 'Survivor Privacy' in Favish" (posted 4/9/04) (discussing vital privacy interests found in Reporters Committee and Favish).

48. Favish, 124 S. Ct. at 1576-77.

49. Id. at 1577, 1580 (stating that when subject of government record is private citizen, privacy interest is "at its apex," and finding that "public" nature of photographs does not detract from "weighty" privacy interests involved); see also *FOIA Post*, "Supreme Court Rules for 'Survivor Privacy' in Favish" (posted 4/9/04) (discussing fact that public location and disclosure of photographs did not negatively impact privacy interests).

50. Favish, 124 S. Ct. at 1577-79; see also *FOIA Post*, "Supreme Court Rules for 'Survivor Privacy' in Favish" (posted 4/9/04) (pointing out that in Favish "this meant that the expected 'public exploitation' of the requested records through 'attempts to exploit pictures of the deceased family member's remains for public purposes' by the media, among other things, were properly taken into consideration").

51. Times Picayune, 37 F. Supp. 2d at 477 (finding protectable privacy interest in mug shot despite fact that defendant was well known and photograph already had been made public).